

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Effects of Communications Towers on)	WT Docket No. 03-187
Migratory Birds)	

REPLY COMMENTS OF PCIA

PCIA, The Wireless Infrastructure Association (“PCIA”), by its attorneys and pursuant to the Notice of Inquiry released in this docket¹, hereby files these reply comments in the Commission’s inquiry into whether communications towers pose a risk to migratory birds. As detailed below and in PCIA’s Comments submitted on November 12, 2003, the Comments submitted in this proceeding overwhelmingly establish that the FCC should not adopt mandatory avian guidelines, or amend existing environmental regulations at this juncture. Rather, before considering any changes to the existing regulations further study is warranted in order to isolate causes and effects of tower siting on avian mortality and to identify workable solutions. Toward this end, PCIA draws the Commission’s attention to other submissions in this docket that are inaccurate or distort the practical and legal implications of tower siting.

I. THE FISH & WILDLIFE SERVICE (“FWS”) GUIDELINES DO NOT TAKE INTO ACCOUNT PRACTICAL TOWER SITING CONSIDERATIONS

A. FWS Guidelines

PCIA and its members are concerned about avian mortality and are eager to identify a workable solution to address problems to the extent that they exist. However, PCIA believes that any regulatory scheme or industry practice designed to mitigate migratory bird collisions with

¹ Notice of Inquiry in WT Docket No. 03-187, *In the Matter of Effects of Communications Towers on Migratory Birds*, FCC 03-205, released August 20, 2003 (“NOI”).

towers should be based on scientific evidence and designed to address reliably documented problems in a manner that takes into account the practical problems of tower siting and public safety. PCIA does not believe that the FWS Guidelines accomplish these goals.

In addition to failing to take into account practical consideration of tower operations, the FWS Guidelines are internally inconsistent, rendering them unworkable. Not only would it be difficult—if not impossible—for tower owners to comply with all of the Guidelines, but it would also lead to absurd results.²

As PCIA noted in its Comments, Guideline No. 1 which encourages collocations of six to ten providers on a single tower is incompatible with Guideline No. 2 which recommends (strongly) that no tower exceed 199 feet. As a practical matter, it would be very difficult for six to ten different providers to collocate on a tower less than 200 feet. Each provider's antenna has mandatory separation requirements, meaning that the lower level providers' antennas would be affixed at very low levels. At reduced height levels, providers would be unable to achieve the desired service coverage. This would, in turn, cause the providers to seek placement on additional towers, which would conflict with the whole purpose of collocation—the reduction of the number of towers. Guideline No. 1 also conflicts with Guideline No. 9, which recommends that towers accommodate three users.

Guideline No. 4 recommends siting towers in clusters. Unfortunately, the placement of towers in clusters provides little benefit to either the providers or broadcasters using the towers, or to the people attempting to receive their signals. The nature of wireless communications mandates that towers be spread throughout a geographic area in order to reach maximum coverage. Locating towers in clusters would merely concentrate all signals into a discrete subdivision, leaving the rest of the geographic area without coverage.

² In discussing the following selected guidelines, PCIA does not imply or suggest that the remaining guidelines are

Guideline No. 4 also recommends siting towers away from wetlands and areas with “high incidence of fog, mist, and low ceilings.” Although this recommendation may be useful in geographic areas with isolated wetlands and weather patterns, it completely ignores the fact that, in certain portions of the country, wetlands and adverse weather patterns are the norm. An obvious example is Seattle. The weather there is characterized by a high incidence of fog, mist and low ceilings. If the FCC were to adopt the FWS Guidelines as mandatory, it would be extremely difficult for Americans in the Seattle market to obtain broadcast coverage or other wireless communications services. Similarly, in low lying coastal areas, wetlands are prevalent. Mandatory application of these guidelines would mean that Americans in these markets would effectively be cut off from wireless services.

The vagaries of Guideline No. 5 provide a clear example of why further study of towers, particularly lighted towers, is necessary prior to creating a definitive set of rules governing tower construction and operation. Although Guideline No. 5 recommends that tower owners affix only white or red strobe lights to towers, it acknowledges that “[r]ed strobe lights have not yet been studied.” In essence, the FWS is advocating an unproven practice. PCIA advises against taking such hasty action. Prior to implementing an experimental program such as this, PCIA strongly recommends further study and testing.

Guideline No. 7 recommends that “[r]oad access and fencing should be minimized to reduce or prevent habitat fragmentation and disturbance and to reduce above ground obstacles to birds in flight.” There are two immediately apparent problems with this Guideline. First, it is likely that local government zoning agencies will require road access and fencing for public safety reasons. Although PCIA strives to prevent avian mortality, it cannot do so at the expense of human safety considerations. Second, the FWS appears to take the position that ground

fencing presents an obstacle to birds in flight. Ground fencing is in no way unique to communications tower sites. Fences are commonly found at businesses, homes, schools and government buildings. Moreover, the FWS has not presented any scientific evidence showing that fences located around communications towers are more likely to cause bird deaths than other fences. As a result, implementation of this Guideline would be particularly draconian, if not discriminatory.

B. American Bird Conservancy, Forest Conservation Council and Friends of the Earth Guidelines

In conjunction with the FWS Guidelines, the American Bird Conservancy, Forest Conservation Council and Friends of the Earth (collectively “ABC”), advocate that the FCC adopt additional procedures so that it can gather bird-related data during the tower registration process. This data would include collecting for each tower: surveys, literature reviews, kill data from other structures and information from other agencies related to listed or proposed endangered species. However, ABC misunderstands the nature of the tower registration process. The FCC has neither the resources nor the authority to conduct a comprehensive site review for each tower constructed.

Moreover, ABC fails to identify how the gathering of this information will directly affect the species it intends to protect. Absent further study, PCIA does not believe that these burdensome measures are reasonably related to the goals ABC appears to promote.

II. THE FCC DOES NOT INCUR LIABILITY FOR TOWER REGISTRATIONS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT (“NEPA”), THE MIGRATORY BIRD TREATY ACT (“MBTA”) OR THE ENDANGERED SPECIES ACT (“ESA”)

In its comments, ABC alleges that the FCC is in violation of NEPA, the MBTA and the ESA for failure to establish a comprehensive regulatory scheme addressing bird kills. PCIA

disagrees with the legal analysis supporting ABC's allegations.³

In support of its allegation that the FCC "is under a statutory duty to prevent" bird kills under the MBTA, ABC cites *United States v. Moon Lake Electric Association*.⁴ ABC's reliance on *Moon Lake* is misplaced. In that case, the United States initiated a criminal suit against Moon Lake Electric Association ("Moon Lake"), a rural electric cooperative in connection with the deaths of birds protected under the Bald and Golden Eagle Protection Act ("BGEPA") and the MBTA. The United States alleged that 38 birds were electrocuted when they came to roost on Moon Lake's energized electrical lines. The United States further alleged that the lines, which were an ideal roosting place, could have inexpensively been rendered safe for birds.

Ultimately, on a motion to dismiss, the court concluded that under the circumstances, the United States properly alleged violations of the MBTA, even if Moon Lake did not intentionally cause the birds' deaths. The court did not, however, reach a decision on the merits. In addition, the court did not decide—and indeed was not asked to decide—whether the federal agencies regulating Moon Lake's plant were liable in anyway for these violations.

Furthermore, *Moon Lake* presents distinguishable facts. In *Moon Lake*, the utility was actively operating its plant in an unsafe manner when the cost to render the facilities safe was relatively minor. Importantly, the court did not find that the very existence of the utility's facilities incurred liability; rather, it found that it was the manner in which they were maintained that was actionable. This is very different from the matter at issue in the present docket, in which ABC alleges that the very existence of a communications tower constitutes a violation of the MBTA. Following ABC's theory, any human-caused obstacle would create a violation of the MBTA.

³ PCIA concurs with the Cellular Telecommunications & Internet Association's conclusion that the FCC is not subject to liability under NEPA, the MBTA and the ESA, set forth in CTIA's comments submitted in this Docket on November 12, 2003.

⁴ 45 F. Supp. 1070 (D. Colo. 1999) (hereinafter "*Moon Lake*").

Similarly, ABC's application of *Humane Society of the United States v. Glickman*,⁵ is misplaced. In that case, the Department of Agriculture, through its Animal Health and Inspection Service's Wildlife Services division, devised a plan to manage the exploding population of Canada geese in Virginia by authorizing interference with the geese's habitat, capture and killing. Although the FWS had the exclusive authority to permit such action under the MBTA, the FWS nonetheless issued an official policy stating that federal agencies no longer needed a permit to capture, kill, etc. migratory birds. Three public interest groups sued to halt the goose management program, alleging that the FWS alone has the statutory authority to manage the geese. The court agreed, finding that the MBTA grants exclusive authority to FWS to issue permits for the capture or killing of migratory birds, such as the Canada goose.

HSUS v. Glicksman also presents distinguishable facts. In that case, the Department of Agriculture promulgated an affirmative plan to capture and kill protected birds without proper authorization from the FWS. This issue has absolutely no bearing on the matter at hand because, to PCIA's knowledge, the FCC has never advocated or authorized the capture or killing of protected birds. The FCC's licensing and registration of tower facilities cannot be equated with such a program as was implemented in *Glicksman*.

III. FURTHER STUDY OF THE MIGRATORY BIRD MORTALITY ISSUE IS NECESSARY

As stated in its comments, PCIA strongly believes that it would be inappropriate to implement or amend any regulations without further study of the issues. Indeed, the FWS seemingly also supports this position, as evidenced by its Comments in this proceeding:

Because so few studies—at both short and tall towers—are ongoing, it is somewhat meaningless to debate the realistic impact and true mortality caused by communication towers on birds until systematic research is conducted nationwide.⁶

⁵ 217 F.3d 882 (D.C. Cir. 2000) (hereinafter "*HSUS v. Glicksman*").

⁶ FWS Comments at p. 4.

The FWS then goes on to recognize the imprecise nature of its own information and statistics: “The figures we devised are based on the best available previous models with current estimates updated to reflect the exponentially growing numbers of towers.”⁷ The FCC simply cannot undertake a comprehensive regulatory scheme without current and verified information.

That being said, PCIA does not concur with the National Wildlife Federation (“NWF”) position that funding for the necessary research should be allocated to the communications industry.⁸ It is not just the communications industry that benefits from towers. Nearly all Americans across the nation benefit from our national communications system—whether from broadcast television, wireless telephone networks, or public safety systems. As a result, PCIA believes that it would be neither appropriate nor fair to place the burden solely on the communications industry.

The FCC should not take action without proper study of the issue or a fair and organized plan for implementing proposed solutions; particularly since the FCC regulations presently in effect (codified at 47 CFR Sec. 1.1301 et. seq.), adequately cover the issue of avian mortality of migratory birds. There are specified situations for which an EA is required under the regulations. For example, where a proposed tower structure may have a “significant environmental effect” on a threatened or endangered species, an EA is required under §1.1307(a)(3). The regulations also provide for a catch-all provision to allow for environmental review of actions that are otherwise categorically excluded from submitting an EA. Pursuant to §1.1307(c) an interested person may petition the FCC claiming that a particular action may have a “significant environmental effect” (this presumably includes any effect on migratory birds). If in reviewing the petition, the FCC determines that the proposed action may have a significant

⁷ *Id.*

⁸ NWF Comments, filed November 11, 2003, p. 3.

environmental impact, then the FCC will require the applicant to prepare an EA. Any required EA would have to address impact on “natural migration paths for birds” pursuant to §1.1311(b). Thus, when particular situations arise that may merit further environmental review, there is a process in place to require such review. Finally, there could be potential liability to tower owners under the MBTA which provides a strong deterrent.

IV. CONCLUSION

PCIA believes that there is no reliable, scientific data available to support a change in the applicable, environmental regulations. To the extent that the FCC feels that some change in these regulations may be warranted, we respectfully suggest that an unbiased, comprehensive study be commissioned by the FCC prior to any proposed rulemaking. In our members’ experience, as detailed in our Comments, such a study will not support the positions advocated by proponents of new or modified regulatory controls.

Respectfully submitted,
PCIA

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CERTIFICATE OF SERVICE

I, Elinor McCormick, hereby certify that on this 11th day of December, 2003, I had copies of the foregoing "Comments of PCIA" hand-delivered or sent by U.S. first class mail, postage prepaid, to the following:

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